

Opinion Issued June 5, 2008



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-07-00459-CV

**RONALD R. EIKENHORST, M.D. AND TRINITY COMMUNITY
MEDICAL CENTER, Appellants**

V.

LEONARD M. WELLBROCK AND MARY WELLBROCK, Appellees

**On Appeal from the 335th District Court
Washington County, Texas
Trial Court Cause No. 33639**

MEMORANDUM OPINION

This appeal arises from a medical malpractice claim brought by Appellees, Leonard and Mary Wellbrock, against Appellants, Trinity Community Medical

Center (Trinity) and Ronald Eikenhorst, M.D. The trial court denied Appellants' motions to dismiss which asserted that the Wellbrocks failed to satisfy the requirements set forth in section 74.351 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (Vernon Supp. 2007). The Wellbrocks move to dismiss the appeal for want of jurisdiction, alleging that Appellants are appealing an interlocutory order which denied relief under section 74.351(l). *See id.* § 74.351(l). As to the merits, in their sole issues, both Trinity and Eikenhorst contend that the trial court abused its discretion in ruling that the Wellbrocks' expert report complies with the statute. We conclude that we have jurisdiction over the appeal and affirm the trial court's decision.

Background

On August 27, 2004, an ambulance transported Leonard Wellbrock to Trinity after he was seriously injured in a motor vehicle accident. Leonard arrived at Trinity immobilized on a backboard and wearing a cervical collar, with head blocks on either side of his head. The emergency physician ordered radiographic studies of Leonard's spine, which Trinity performed. The Wellbrocks allege that Trinity's radiology technicians removed Leonard from the backboard, took off his cervical collar, and placed him upright in a sitting position in order to take the x-rays.

Dr. Eikenhorst is the radiologist who interpreted Leonard's x-rays. In his report, he noted that Leonard had a spinal dislocation injury at the C₇-T₁ level, but Eikenhorst diagnosed the dislocation as being "consistent with a history of prior fracture and prior surgery." The Wellbrocks claim that Eikenhorst did not communicate his findings on the nature or extent of Leonard's injuries to the emergency department physician, and as a result, Trinity discharged Wellbrock "without the required orthopedic or neurological expedited evaluation and treatment."

On August 29, after Leonard's condition had deteriorated, Mary took Leonard to St. Luke's Medical Center. There, the orthopedic surgeon who had previously operated on Leonard's spine surgically repaired his cervical spine fracture. Leonard now suffers permanent impairment, which the Wellbrocks attribute to the willful and wanton negligence by Trinity and Eikenhorst. Specifically, the Wellbrocks allege that Trinity and Eikenhorst exacerbated Leonard's injuries when (1) Eikenhorst failed to diagnose a serious injury to Leonard's back, causing a delay in his treatment, and (2) Trinity removed Leonard's neck collar and backboard during the x-ray process, instead of keeping him immobilized. The Wellbrocks brought suit under both Chapter 74 and the Emergency Medical Treatment and Active Labor Act (EMTALA).

In support of their claims, the Wellbrocks filed the expert report of Dr. John Harris. The report first classifies Leonard's injury as a bilateral interfacetal dislocation (BID) which occurred at the C₇-T₁ vertebra. According to Harris, the dislocation is clearly shown on the imaging studies reviewed by Eikenhorst. Harris states that "BID is a completely unstable injury which requires prompt recognition and appropriate expedited management to spare or prevent, as much as possible, further injury to the spinal cord." Harris continues by stating that "any injury to the spine requires immediate attention, especially when there is pressure on the spinal cord, and the delay in treatment will unnecessarily aggravate such injuries."

In regard to the standard of care required by Eikenhorst, the report states that the standard of care required Eikenhorst to: (1) communicate his report of Wellbrock's cervical spine CT examination directly to the emergency physician as soon as Dr. Eikenhorst completed his interpretation of the CT scan; (2) make the correct diagnosis of BID, a relatively common and radiographically obvious injury; (3) immediately transmit the diagnosis of BID to the attending physician personally by direct communication; and (4) document, in his written report, that he has communicated the findings of BID to the attending physician, so as to ensure that the patient remains immobilized and receives the proper and immediate orthopedic or neurological evaluation of the serious spinal injury. The report then

outlines the ways by which Eikenhorst deviated from the standard of care including failing to communicate his findings, failing to recognize BID and rendering an erroneous diagnosis, and failing to document in his report that he communicated the C₇-T₁ findings to the emergency physician.

In describing how Eikenhorst's breach of the standard of care caused Leonard's injuries, the report reads in pertinent part:

- (1) Dr. Eikenhorst's egregious, willful and wanton failure to immediately communicate his finding of the CT scan to the Emergency physician . . . resulted in Mr. Wellbrock's being discharged from the Trinity Medical Center, and in turn, led to further aggravation of Mr. Wellbrock's cervical spinal cord injury due to prolonged compression of the cord and unwarranted delay in treatment.
- (2) . . . It is my opinion that the failure of Dr. Eikenhorst to render a correct interpretation of Mr. Wellbrock's serious BID injury, which necessarily involves serious injury to the spinal cord with potential paralysis . . . directly led to the improper discharge of Mr. Wellbrock without the required orthopedic or neurological immediate evaluation and treatment. It is my expert opinion that Dr. Eikenhorst's failure to properly interpret Mr. Wellbrock's serious BID caused the delay in evaluation and treatment that then resulted in his permanent impairments which, within reasonable medical probability, would not have resulted if Dr. Eikenhorst had properly diagnosed the serious BID.
- (3) . . . It is my opinion that due to the serious nature of Mr. Wellbrock's injury, the failure of Dr. Eikenhorst to personally communicate and discuss the imaging studies with the Emergency Department physician led to Mr. Wellbrock's discharge without the required orthopedic or neurological expedited evaluation and treatment, which, in reasonable medical probability, would have led to greatly recovered health status by Mr. Wellbrock, instead of his current permanent impairment. . . .

During the time of his discharge from the Trinity Medical Center until his admission at St. Luke's Episcopal Hospital, Mr. Wellbrock's spinal cord injury progressed, and became clinically obvious with his deteriorated health.

Had Dr. Eikenhorst made the correct diagnosis and relayed the information to the Emergency physician, it [sic] my expert opinion and is within reasonable medical probability, that Mr. Wellbrock would have been emergently transferred to St. Luke's Episcopal Hospital and treated appropriately and promptly, with a much better prognosis than he had when admitted . . . on 8/29/04, a delay of two days without the proper stabilization of the spinal column and immediate attention to the pressure on the spinal cord due to the BID injury.

Dr. Harris's report also outlines the standard of care for Trinity and the Department of Radiology. According to Harris, the standard of care for a patient admitted to the hospital emergency department complaining of severe neck pain and with a cervical collar in place "requires that the cervical immobilization never be removed until the cervical spine has been 'cleared' (allowing the removal of the immobilizing apparatus) by the radiologist." The report also states that the standard of care requires that the radiology department "develop and maintain Policies and Procedures regarding the management of patients suspected of cervical spine injury" and that the hospital "instruct and document educational programs for employee management of patients suspected of having cervical spine injuries (as Mr. Wellbrock) to ensure that all the Hospital staff handling such injured patients. . . will perform all the required procedures in the required manner

to prevent further cervical spine injuries.”

The report proceeds by outlining how, in Dr. Harris’s opinion, Trinity deviated from the standard of care. It states that there is no record that Leonard’s cervical spine had been cleared, but there is no image of the cervical collar being in place on any of the CT scans. The report concludes that this means that the cervical collar had been removed before placing Leonard on the CT scan. In addition, the erect chest x-ray of Leonard shows that Leonard was placed in a sitting position for the chest x-ray, without a cervical collar, which reasonably means the x-ray technician removed the spine immobilization support. Dr. Harris opines that removing the cervical collar and placing a patient in a sitting position, when the patient is suspected of having a spine injury, is a breach of the standard of care. His report also states that Trinity deviated from the standard of care by failing to document the time Eikenhorst interpreted the x-ray so as to ensure the prompt transcription and printing of the report for the patient’s chart.

Dr. Harris’s report concludes by describing the way in which Trinity’s breach of the standard of care caused Leonard’s injuries. It reads in pertinent part:

- (1) . . . The failure of the radiology department staff to continuously maintain Mr. Wellbrock’s spine immobilized during the imaging procedures, within reasonable medical probability, exacerbated and aggravated his serious BID injury, which ultimately resulted in permanent impairments.
- (2) . . . [R]emoval of the cervical collar and placing a patient into an

erect (sitting) position, when the patient is suspected of an acute cervical spine injury . . . in reasonable medical probability leads to further damage to the already injured spine. The fact that further damage and injury to the spine cord occurred is clearly evident by the major progression of Mr. Wellbrock's neurologic findings from the time he was discharged from Trinity Medical Center until his admission to St. Luke's Episcopal Hospital. Therefore, it is my expert opinion that the further injury and aggravation of Mr. Wellbrock's BID, within reasonable medical probability, was caused by the willful and wanton removal of his spinal immobilization apparatus and movement of the patient without such immobilization during the studies performed by the Trinity Medical Center Radiology Department and resulted in his permanent impairments.

- (3) . . . [T]he failure of the Hospital to ensure that this imaging report was promptly included in Mr. Wellbrock's chart, to ensure its review by the Emergency Department physician, caused a delay in the treatment of Mr. Wellbrock, thereby aggravating his spinal cord injury, which resulted in permanent impairments to Mr. Wellbrock because of the prolonged compression of the spinal cord until his treatment at St. Luke's three days later.

After receiving Harris's report, both Trinity and Eikenhorst objected to its sufficiency and moved to dismiss the Wellbrocks' suit, contending that the expert report failed to comply with the requirements of section 74.351. *See* TEX. CIV. PRAC. & REM. CODE ANN. §74.351. The trial court denied Trinity's and Eikenhorst's motions to dismiss, and they appealed.

Appellate Jurisdiction

As an initial matter, the Wellbrocks contest our jurisdiction over the appeal. Specifically, the Wellbrocks contend that Trinity and Eikenhorst cannot appeal under section 74.351(b) because they filed an expert report and that section applies only when no report has been filed. *See id.* § 74.351(b). Rather, the Wellbrocks contend, Trinity and Eikenhorst challenge the sufficiency of the expert report which is a challenge under section 74.351(l) and not appealable. *Id.* We disagree.

Section 74.351(b) states that if

“an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), enter an order that: (1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and (2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.”

Id. Section 74.351(l) states that “a court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report in Subsection (r)(6).” *Id.* § 74.351(l). Section 51.014 allows an interlocutory appeal from a court order that “denies all or part of the relief sought by a motion under section 74.351(b), except that an appeal may not be

taken from an order granting an extension under section 74.351” or from an order that “grants relief sought by a motion under section 74.351(l).” *Id.* § 51.014(a)(9) & (10).

Here, both Trinity and Eikenhorst moved to dismiss the suit under 74.351(b), as only subpart (b) provides for dismissal and fees,¹ and the trial court denied relief. “As subpart (c) defines a timely but deficient report as one that ‘has not been served,’ the same meaning must be given the same phrase in subpart (b).” *Lewis v. Funderburk*, No. 06-0518, 2008 WL 1147188, at *5 (Tex. April 11, 2008); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b) & (c) (Vernon Supp. 2007). An expert report has thus not been served for purposes of 74.351(b) if only an inadequate report has been served. *Lewis*, 2008 WL 1147188, at *1. Parties are entitled to bring an interlocutory appeal for denial of relief under 74.351(b). TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9). We therefore hold that we have jurisdiction over this appeal.

Expert Report

In their sole issues, both Eikenhorst and Trinity contend that the trial court erred in its determination that the Wellbrocks’ expert report complied with section 74.351 of the Civil Practice and Remedies Code. Both Eikenhorst and Trinity contend that (1) Harris is not qualified to offer any opinions in this case under

section 74.401 or 74.402 respectively; (2) Harris is not qualified to offer opinions on causation because his specialty is in radiology, not neurology; and (3) the report is conclusory on causation and does not distinguish Leonard's pre-existing condition and injuries. *See id.* §§ 74.401 & 74.402. In response, the Wellbrocks assert that Trinity and Eikenhorst waived their objections to the expert report by failing to timely object as required by section 74.351. *See id.* § 74.351(a). Trinity responds that it preserved its right to request dismissal by timely objecting.

Standard of Review

We review section 74.351 rulings under an abuse of discretion standard. *See Am. Transitional Care Ctrs. v. Palacios*, 46 S.W.3d 873, 875, 877 (Tex. 2001) (reviewing ruling under predecessor statute); *Gray v. CHCA Bayshore L.P.*, 189 S.W.3d 855, 858 (Tex. App.—Houston [1st Dist.] 2006, no pet.). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles. *See Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999). When reviewing matters committed to the trial court's discretion, we may not substitute our own judgment for that of the trial court. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). A trial court does not abuse its discretion merely because it decides a discretionary matter differently than an appellate court would in a similar circumstance. *Gray*, 189 S.W.3d at 858.

¹ *Lewis v. Funderburk*, No. 06-0518, 2008 WL 1147188, at *1 (Tex. Apr. 11, 2008)

However, a trial court has no discretion in determining what the law is or in applying the law to the facts. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

Section 74.351 of the Texas Practice and Remedies Code

Pursuant to section 74.351, medical malpractice plaintiffs must provide each defendant physician and health care provider with an expert report. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2007). An expert report means a “written report by an expert that provides a fair summary of the expert’s opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.” *Id.* § 74.351(r)(6). A defendant may file an objection to the sufficiency of the report not later than the 21st day after the date it was served. *Id.* § 74.351(a). A trial court shall grant a motion challenging the adequacy of the expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the statutory definition of an expert report. *Id.* § 74.351(l).

Although the report need not marshal all the plaintiff's proof, it must include the expert's opinions on the three statutory elements—standard of care, breach, and causation. *See Palacios*, 46 S.W.3d at 878–79. In detailing these elements, the report must provide enough information to fulfill two purposes if it is to be considered a good faith effort. *Id.* at 879. First, the report must inform the defendant of the specific conduct that the plaintiff has called into question. *Id.* at 879. Second, the report must provide a basis for the trial court to conclude that the claims have merit. *Id.* A report that merely states the expert's conclusions as to the standard of care, breach, and causation does not fulfill these two purposes. *Id.* The expert must explain the basis for his statements and must link his conclusions to the facts. *Bowie Mem'l Hosp.*, 79 S.W.3d at 52. Furthermore, in assessing the report's sufficiency, the trial court may not draw any inferences, and must instead rely exclusively on the information contained within the report's four corners. *See Palacios*, 46 S.W.3d at 879. A report that omits any of the statutory requirements is not a good faith effort to comply with the Act. *Id.* A trial court must dismiss a cause if it determines that the report does not represent a good faith effort to comply with the statute's requirements. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(l); *see Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003).

Waiver

The Wellbrocks contend that both Eikenhorst and Trinity waived any objection to Harris's expert report by failing to timely object. Under section 74.351, a defendant may file an objection to the sufficiency of the report not later than the 21st day after the date it was served. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). The Wellbrocks served Harris's report on November 22, 2006; therefore, the statute required any objections to the report be filed by December 13, 2006. *See id.* Trinity mailed its objection by certified mail on December 13, and the trial court clerk file stamped it on December 15. Rule 21a of the Texas Rules of Civil Procedure authorizes certified mail as a method of service and states that "service by mail shall be complete upon deposit of the paper . . . in a post office." TEX. R. CIV. P. 21a. Rule 21a further states that "whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail . . . three days shall be added to the prescribed period." *Id.* Rule 21a applies to the statutory requirements contained in the Texas Civil Practice and Remedies Code for medical malpractice cases. *See Herrera v. Seton NW. Hosp.*, 212 S.W.3d 452, 459 (Tex. App.—Austin 2006, no pet.); *Univ. of Tex. Health Sci. Ctr. v. Gutierrez*, 237 S.W.3d 869, 872 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (applying rule

21a to section 74.351). Trinity's objections therefore were timely filed under rule 21a because they were mailed by certified mail on December 13, within the twenty-one day window.

The Wellbrocks assert that Trinity's motion to dismiss, filed on January 11, 2007, was also untimely. Contrary to this assertion, however, a motion to dismiss is not subject to the twenty-one day deadline, and in fact, cannot be filed until after the 120-day window in section 74.351(b) has expired. *Lewis*, 2008 WL 1147188 at *1 ("some challenges—specifically those filed within the first 120 days—*cannot* seek dismissal or fees until the 120-day window has closed"). Trinity's motion to dismiss was therefore timely filed.

The Wellbrocks also contend that Eikenhorst's objections were untimely filed and thus waived. Eikenhorst filed his objections to Harris's report on December 18, 2006. Eikenhorst asserts that his objections were timely filed under rule 21a because he received Harris's report by certified mail and was thus entitled to an additional three days to respond. *See* TEX. R. CIV. P. 21a. The certificate of service attached to Harris's report does not indicate the method of service, but includes both regular mail and certified mail as possible methods. Applying rule 21a, Eikenhorst's objections to the Wellbrocks' report were due on December 16. Because December 16, 2006 was a Saturday, the deadline to file was extended to

December 18, the date Eikenhorst served his objections. *See* TEX. R. CIV. P. 4. We hold that Eikenhorst's objection to Harris's report was timely filed and address the case on the merits.

Harris's qualifications under sections 74.401 and 74.402

Both Eikenhorst and Trinity assert that Harris was not "practicing health care" as defined by section 74.401 or 74.402 (respectively), and therefore was not qualified to give an expert opinion in this case. Section 74.401 defines the qualifications of an expert witness in a suit against a physician, and section 74.402 defines the qualifications of an expert witness in a suit against a health care provider. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.401 & 74.402 (Vernon 2005).

Under section 74.401, "a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care only if the person is a physician who: (1) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose; (2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care." *Id.* § 74.401(a). "Practicing medicine"

or “medical practice” includes “training residents or students at an accredited school of medicine or osteopathy or serving as a consulting physician to other physicians who provide direct patient care, upon the request of such other physicians.” *Id.* § 74.401(b). Section 74.402 is similar and requires that an expert in a healthcare liability case be “actively practicing health care.” *Id.* § 74.401(c)(2). It defines “practicing health care” as “(1) training health care providers in the same field as the defendant health care provider at an accredited educational institution; or (2) serving as a consulting health care provider and being licensed, certified, or registered in the same field as the defendant health care provider.” *Id.* § 74.402(a).

Dr. Harris’s curriculum vitae (CV) and his expert report indicate that he is licensed in Pennsylvania, Michigan, and Texas, but has not been in full-time clinical practice since 2001. His report, however, states that he is active in preparing Board-Review sessions for radiology residents at The University of Texas-Houston Medical School, Baylor College of Medicine, and the United States Naval Hospital in San Diego. He also writes articles for publication in peer-reviewed journals and for radiologic textbooks. In addition, his CV states that his present title is professor emeritus of radiology at The University of Texas-Houston Medical School, as well as adjunct professor in the department of radiology at Baylor College of Medicine. It further states that Harris is on the active radiology

staff at Hermann Hospital. Taking into consideration that Harris's CV and report indicate that he teaches medical students at an accredited school, as well as remains on the active staff at Hermann Hospital, we hold that the report sufficiently sets forth that Harris is qualified to give his expert opinion in this case under both sections 74.401 and 74.402.

Harris's qualifications as to causation

Eikenhorst and Trinity further contend that Harris is not qualified to give an opinion on causation because he is a radiologist, not a neurologist, and Leonard's injuries were neurological. To offer an expert opinion "about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim, the expert must be a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence." TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(5)(C) (Vernon Supp. 2007). Under the Texas Rules of Evidence, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify if it will assist the trier of fact to understand the evidence or to determine a fact issue. TEX. R. EVID. 702.

"Given the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor

should be automatically qualified to testify as an expert on every medical question. Such a rule would ignore the modern realities of medical specialization.” *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996). Many cases have thus excluded an expert’s report when the report did not prove the expert was qualified to address causation in the specified field. *See, e.g., id.* (emergency room physician not qualified to testify about brain injury because his opinions were speculative); *Forrest v. Danielson*, 77 S.W.3d 842, 848 (Tex. App.—Tyler 2002, no pet.) (case dismissed when orthopedic surgeon did not indicate that he was familiar with procedures used by surgeons in that case). These cases, however, are distinguishable. Unlike in *Broders*, in which the expert never testified that he knew from either experience or study the effectiveness of the treatments in general, Harris states, in his report, that his “experience, background, and continuing experience in the very area that is at issue in this case—the acutely injured cervical spine—supports [sic] the opinions” that he stated therein. He also states that “it is my experience, having interpreted such imaging and thereafter discussing the findings with orthopedic surgeons and neurosurgeons that surgical intervention would have immediately followed.” Harris, therefore, clarifies that he has experience in this type of injury, unlike the experts in the above-cited cases. In addition, Harris’s CV indicates that he has published numerous articles concerning

this type of injury, including *Acute Cervical Spine Trauma*, *Acute Injuries of the Spine*, and *A Practical Classification of Acute Cervical Spine Injuries*. Given Harris's training and experience with the type of injury at issue, the trial court did not abuse its discretion in ruling that Harris is qualified to give an opinion on causation.

Causation

Eikenhorst and Trinity contend that the Wellbrocks' expert report is deficient as a matter of law on the issue of causation because it (1) fails to distinguish Leonard's pre-existing condition and injuries, and (2) fails to describe the causal relationship between Eikenhorst's and Trinity's alleged negligence and Leonard's alleged damages.

Pre-existing Injuries

Both Eikenhorst and Trinity contend that the report is deficient as to causation because it fails to consider Leonard's pre-existing injuries. Both appellants cite to *Ballan* and *Barko* for support. *Ballan v. Gibson*, 151 S.W.3d 281 (Tex. App.—Dallas 2004, no pet.); *Barko v. Genzel*, 123 S.W.3d 457 (Tex. App.—Eastland 2003, no pet.).

In *Ballan*, a patient died in the emergency room as a result of arteriosclerotic cardiovascular disease, and the plaintiffs brought suit alleging his doctor was

negligent by his failure to treat five cardiac risk factors. The expert's report did not state how the doctor's alleged failure to act regarding three of the risks caused Ballan's death, nor did it rule out the factors beyond the doctor's control as the cause of death. *Ballan*, 151 S.W.3d at 284. The court held that the expert report was conclusory and affirmed the motion to dismiss. *Id.*

In *Barko*, the plaintiff alleged that her emergency room physician negligently failed to diagnose and treat her disc re-herniation, which she asserted led to permanent neurological damage and a miscarriage. *Barko*, 123 S.W.3d at 458. The court held that the report was insufficient to satisfy the statutory requirements because it: (1) did not indicate that the plaintiff would have recovered from the back injury but for the doctor's negligence; (2) did not state that the back surgery would have been avoided but for the doctor's negligence; and (3) did not make any attempt to eliminate either the back injury itself or the attempt to surgically repair it as a potential cause of the permanent neurological damage. *Id.* at 460–61.

Unlike the reports in *Barko* and *Ballan*, Dr. Harris's report does address Leonard's pre-existing injuries. In his report, he states that the injuries were aggravated and exacerbated by Eikenhorst's and Trinity's negligence and that this aggravation resulted in his permanent impairments. He further states that the

failures by Eikenhorst and Trinity to follow the standard of care “directly caused the aggravation of his serious spinal injury . . . and thereby resulted in delayed treatment with permanent disability.” He also opines that the proper evaluation and treatment would have “led to greatly recovered health status by Mr. Wellbrock, instead of his current permanent impairment.” Harris therefore considered Leonard’s existing injuries and concluded that it was the aggravation of these injuries that caused his permanent impairment, not the pre-existing injuries themselves.

Causation as to Eikenhorst

In regard to Eikenhorst’s causation, Harris opined that Eikenhorst’s failure to communicate his CT scan findings and his failure to properly diagnose Leonard’s injury caused a delay in treatment and aggravation of Leonard’s injuries. Harris states that had Eikenhorst properly diagnosed Leonard with BID, surgery would have immediately followed, relieving the pressure on the spinal cord and stabilizing the spine, which would have led to greatly recovered health status by Leonard, instead of his current permanent impairment. Eikenhorst contends that the report contains gaps that prevent it from being a “fair summary.” He contends that Harris fails to explain how failing to identify Leonard’s condition aggravated his injury. We disagree. Harris opined that in reasonable medical probability,

Leonard would have received immediate surgery and had a greatly recovered health status had he obtained an early diagnosis. Thus, the failure of Eikenhorst to properly diagnose Leonard or communicate his CT results to the emergency physician prevented the early diagnosis which would have avoided Leonard's permanent impairments.

In support of his causation argument, Eikenhorst relies on *Bowie*, where the plaintiff alleged that a hospital's physician's assistant misread or misplaced an x-ray and, therefore, did not discover that the plaintiff had fractured her foot. *Bowie*, 79 S.W.3d at 50. Approximately one month later, the plaintiff's orthopedic surgeon discovered the fractured foot. *Id.* The plaintiff filed an expert report, which stated that had the x-ray been properly read, she "would have had the possibility of a better outcome." *Id.* at 51. The Supreme Court, after recognizing that a report need not use any particular magical words, held that the trial court could have reasonably determined that the report did not represent a good-faith effort to summarize the causal relationship. *Id.* at 53. The court noted that the report simply opined that the plaintiff had a "possibility of a better outcome," and did not sufficiently "[link] the expert's conclusion (that [the plaintiff] might have had a better outcome) to [the hospital's] alleged breach (that it did not correctly read and act upon the x-rays)." *Id.*

Eikenhorst also relies on *Longino*, in which the plaintiffs alleged that the doctor failed to perform the tests necessary to diagnose their child's meningitis earlier and the delay caused the child's neurological injuries. *Longino v. Crosswhite*, 183 S.W.3d 913, 915 (Tex. App.—Texarkana 2006, no pet.). The plaintiffs filed an expert report that stated only “that the delay in diagnosis caused significant and permanent neurological injuries.” *Id.* at 918. The appellate court reversed the trial court and determined that the report was insufficient on causation because it failed to “inform the defendant of the specific conduct the plaintiff has called into question” and did not contain specific information concerning Longino's conduct. *Id.*

In contrast to these cases, Harris opined in his expert report that Eikenhorst's breach of his standard of care permitted exacerbation of Leonard's spinal injury by prolonged pressure on the spinal cord that would have been relieved with proper care. Harris states in his report that “surgical intervention would have immediately followed the diagnosis, thereby relieving the pressure on the spinal cord, and stabilizing the spine.” *See Harris County Hosp. Dist. v. Garrett*, 232 S.W.3d 170, 181 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (holding report sufficient that stated that delay in diagnosis of cancer led to poor forecast when delay caused advancement of disease and limited availability of treatment options); *Simonson v.*

Keppard, 225 S.W.3d 868, 875–77 (Tex. App.—Dallas 2007, no pet.) (holding report not conclusory which stated that had deceased received proper diagnosis, deceased would have been admitted to hospital and deterioration would have been prevented or lessened); *Linan v. Rosales*, 155 S.W.3d 298, 305–06 (Tex. App.—El Paso 2004, pet. denied) (affirming verdict in favor of plaintiff for doctor’s failure to timely diagnose cancer based on evidence that during two-month period cancer “involved the lymph vessels” and caused edema and that advancement of cancer eliminated option of breast conserving therapy); *In re Barker*, 110 S.W.3d 486, 491 (Tex. App.—Amarillo 2003, no pet.) (finding expert report stating that negligent failure to recognize medical condition and delay in treatment increased severity of plaintiff’s injuries to be sufficient). The report did not only state that a delay in diagnosis caused permanent injuries; it linked Eikenhorst’s specific conduct to a delay in diagnosis, leading to increased and prolonged spinal pressure, resulting in Leonard’s permanent impairment.

We conclude that Dr. Harris, in his report, provided a fair summary of the causal relationship between Eikenhorst’s failure to meet the pertinent standard of care and the Wellbrocks’ damages, and adequately informed Eikenhorst of the specific conduct the Wellbrocks called into question. Accordingly, we hold that the trial court did not abuse its discretion in denying Eikenhorst’s motion to

dismiss the Wellbrocks' health care liability claims.

Causation as to Trinity

In regard to Trinity's causation, Harris opined that the radiology department's failure to keep Leonard's spine immobilized during the x-ray procedures led to further damage to his already injured spine, resulting in permanent impairments. He further states that the radiology department's failure to include the imaging report in Leonard's chart, to ensure its review by the emergency department, "caused a delay in the treatment of Mr. Wellbrock, thereby aggravating his spinal cord injury, which resulted in permanent impairments to Mr. Wellbrock because of the prolonged compression of the spinal cord until his treatment at St. Luke's three days later." Like Eikenhorst, Trinity contends that Harris's report is conclusory because it does not describe how Trinity's alleged negligence caused Leonard's injuries.

Trinity also relies on *Bowie* and *Longino* to support its contention. However, unlike the reports in *Bowie* and *Longino*, Harris outlined Trinity's specific conduct, which led to the aggravation of Leonard's injuries and resulted in his permanent impairment. In addition, Harris states that Trinity's failure to include the imaging report in Leonard's chart led to a delay in his treatment, which caused prolonged compression of his spinal cord and also attributed to his

permanent impairment. The report thus does not merely state that a delay in treatment caused permanent impairment, but explains why the delay caused that result. The report therefore provided a fair summary of the conduct in question. Accordingly, we hold that the trial court did not abuse its discretion in denying Trinity's motion to dismiss the Wellbrocks' health care liability claims.

Conclusion

We conclude that we have jurisdiction over this appeal and therefore deny the Wellbrocks' motions to dismiss for lack of jurisdiction. We further conclude that the trial court did not abuse its discretion in denying Eikenhorst's and Trinity's motions to dismiss. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Bland.